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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TAMMY SCHWEITZER,

Plaintiff and Appellant,

v.

COUNTY OF VENTURA,

Defendant and Respondent.

2d Civil No. B212570
(Super. Ct. No. 56-2007-00285821-CU-WT-VTA)
(Ventura County)

Eleven months into her probation, Tammy Schweitzer resigned from her position as an investigator for the Ventura County District Attorney's Office Bureau of Investigation (Bureau). The trial court entered summary judgment in favor of the County of Ventura (County) on her first amended complaint for gender discrimination, sexual harassment, wrongful termination, retaliation, and intentional infliction of emotional distress. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant Tammy Schweitzer was hired as a probationary employee by the Bureau as an Investigator II in March 2006. Her performance was rated unsatisfactory throughout her employment. Having been told she would be terminated at the end of her probation, she resigned before that occurred.

The First Amended Complaint

Schweitzer filed a complaint for damages against the County alleging "statutory discrimination (gender)," two causes of action for "wrongful termination in violation of public policy," "interference with protected union activities," and "intentional infliction of emotional distress." The County answered and filed a motion for summary judgment. Thereafter, Schweitzer filed a first amended complaint (FAC) adding a cause of action for "statutory harassment (gender)."

The FAC alleged the following facts to support Schweitzer's claims: (1) her supervisor, Mike McKendry, called her "cutesy;" (2) another supervisor, Jeff Robinson, rubbed her shoulders on two occasions; (3) McKendry and Robinson constantly criticized her work; (4) McKendry issued a memorandum stating she was not performing her duties in a competent manner; (5) when Schweitzer presented a written response to McKendry's memorandum to Deputy Chief Investigator David Stone, he told her she should have waited until her performance evaluation to submit a response; (6) McKendry told Schweitzer that if she did not withdraw her response to his memorandum, it would have a negative effect on their working relationship; (7) she received a formal performance review on September 22 which was revised on September 25 denying her a merit pay increase; (8) she submitted a response to the performance review on October 2; (9) her subsequent supervisor, Jeff Robinson, told her she had done an inadequate job on a case she had been assigned; (10) she was told by an attorney for the collective bargaining unit that she would be terminated; (11) at a meeting on February 20, 2007, Schweitzer told District Attorney Greg Totten and Assistant District Attorney James Ellison that she believed she had been treated differently because of her gender and that she was being retaliated against for exercising her rights under the collective bargaining agreement; and (12) she resigned that day.

The Fair Employment and Housing Act (FEHA) Complaint

Schweitzer filed a timely charge of discrimination with the California Department of Fair Employment and Housing and received a right-to-sue letter. The complaint stated only: "I made complaints to my supervisors about being treated differently because of my gender. On 2-20-07, I met with the District Attorney to ask that something be done. He told me nothing could be done."

Summary Judgment Motion

After substantial discovery, including depositions of numerous former and current employees of the Bureau and district attorney's office, the parties stipulated to a hearing on the County's summary judgment motion.

Schweitzer's Evidence

Schweitzer Declaration. Schweitzer submitted her own declaration expanding on the incidents of discrimination alleged in the FAC.

Robertson Declaration and Deposition. Leslie Robertson, Investigator, stated she believed she was discriminated against and given unfair treatment by Mike McKendry because of her gender and requested transfer to a different unit.

McKendry Deposition. Mike McKendry, Schweitzer's first supervisor, stated that after Schweitzer received his memorandum denying her a merit pay increase, her attitude changed and she was no longer receptive to constructive criticism and did not exhibit a positive work attitude. He denied stating to Schweitzer that she was "cutesy."

Robinson Deposition. Jeff Robinson, Schweitzer's last supervisor, stated that Schweitzer failed to keep him informed of her activities when working on cases and that he did not supervise Leslie Robertson.

Briner Deposition. Rob Briner, Chief Bureau Investigator and Schweitzer's interim supervisor, stated that he had lengthy discussions with Schweitzer about areas of needed improvement.

Shimmel Declaration and Deposition. Richard Shimmel, executive director of the Ventura County Deputy Sheriff's Association, stated that when he met with Briner to discuss Schweitzer's negative performance evaluations, Briner told him that she could avoid having a final negative performance evaluation placed in her personnel file by resigning. He arranged a meeting for her with District Attorney Totten.

Auer Deposition. Gary Auer, former Bureau chief, stated that shortly after Schweitzer was hired, either McKendry or Robinson told him he did not believe Schweitzer was qualified for the job because she had little or no detective experience and that others in the Bureau shared that opinion. When McKendry told him he wanted Schweitzer to withdraw her response to the performance evaluation, he told McKendry that Schweitzer had a right to respond.

Stone Deposition. David Stone stated he had no knowledge of any problems between Leslie Robertson and McKendry or Robinson. He admitted forwarding an e-mail to Leslie Robertson which contained photographs of semi-nude women.

Gonzalez Deposition. Rosario Gonzalez, an investigative assistant, stated she had no problems with Schweitzer, Schweitzer was very professional and was better prepared than other investigators, and she observed Robinson talking to Schweitzer in an office with the door open.

Volpei Deposition. Mark Volpei, Investigator III, stated that Leslie Robertson had interpersonal issues with McKendry, and that he heard male members of the Bureau making inappropriate and sexist comments about women.

Cipollini Deposition and Memorandum. Joseph Cipollini, Investigator III, stated that he observed Schweitzer being counseled by McKendry in an open setting which violated Bureau policy.

Proett Deposition. Susan Proett, Investigator, stated Leslie Robertson was unhappy with McKendry and was considering leaving her job.

Rosales Deposition. Dominique Rosales, an investigative assistant, stated that on one occasion she observed Robinson talking to Schweitzer in a loud tone of voice.

Ellison Deposition. James Ellison stated that Briner informed him that he believed Schweitzer would not complete her probation.

Smith Deposition. Kathy Smith, Investigator, stated that she told Schweitzer that she was surprised that Schweitzer had been assigned to McKendry because she believed McKendry did not like working with women, she heard conversations between McKendry and other males at a party outside the workplace discussing their sexual conquests, a friend of hers dated McKendry and she described him as "psycho" and "stalking her," she observed Robinson ordering Schweitzer to call witnesses in a rude manner when it was almost lunchtime, and she observed Schweitzer extremely upset on several occasions.

Coronado Deposition. Judith Coronado, Human Resources Manager, stated that she believed the e-mail Leslie Robertson received from David Stone was inappropriate.

Velasquez Deposition. Robert Velasquez, Investigator, stated that Auer told him he had resigned his position in early 2007 because the Bureau lacked "diversity;" Velasquez told McKendry he did not want to discuss females McKendry was dating; McKendry had once referred to a female employee as a "bozo;" and, in 1995 and 1997, Velasquez formally complained to his supervisor that he had been subject to derogatory ethnic remarks.

The County's Evidence

Schweitzer Deposition. In support of its motion, the County submitted excerpts from Schweitzer's deposition. In response to the statement, "tell me anything anyone at the Bureau said to you indicative of gender bias," Schweitzer replied: "Mike McKendry and I . . . were discussing a search warrant that I was going to be involved in, . . . I told him that I had never had any problems handling suspects, and he put his finger to his chin like this . . . and twisted it back

and forth and said 'Really, because you're so cutesy,' and I said '. . . I have a gun. I guess that's the great equalizer,' and he said '. . . I guess a crazy woman with a gun would be pretty scary. Did you ever have to act like you were crazy and were going to shoot them if they didn't listen to you?' and I said 'No' . . . ."

Schweitzer described a conversation she had with Robinson in which he said: "Matt and I were sharing a room, which means you and I are sharing a room at the gang conference." The next day, Robinson told Schweitzer that he had told his wife that he and Schweitzer were sharing a room at the gang conference and that "she didn't believe that, of course, because she knows his sense of humor, and she just thought it was funny . . . ." Schweitzer admitted that she did not believe or suspect that Robinson was romantically attracted to her.

When questioned further about Robinson's comment concerning sharing a room at the gang conference, Schweitzer responded: "I feel that was his showing his lack of respect for who I was and why I was there, and that's what his gender bias is, that he feels it's okay to cross that line and be disrespectful in saying things like that, what he said, and when we hit that point, that is when I was very concerned about his--his motivation."

Schweitzer stated that McKendry asked to meet with her in a very abrupt and rude manner, and she believed that indicated gender bias. She stated that when she discussed the performance improvement plan with McKendry and observed that everything was negative, he said, "Don't worry. You're a smart girl. You'll get it. You're not very far from where you need to be."

In December 2006, she had a conversation with Briner in which he stated: "[Y]ou're the one that asked for this training, and if you want, I can have you guys meet every day, and I can have [Robinson] write up a memo on you every day if that's what you want." Schweitzer interpreted this comment as follows: "[A]t that point . . . I felt that any support that he had given me before was gone and that he was basically threatening me that . . . this is as good as it gets, you better deal with it, and that's it."

In response to the question whether anyone at the Bureau ever said anything to her indicative of sexual attraction to her, Schweitzer responded: "It's not necessarily sexual attraction. It just was inappropriate, and that was McKendry asking me about my perfume when I was with him and in his county vehicle. We were going to court on something . . . and he indicated to me that he really liked the perfume I was wearing, and he asked me what it was, and he said it in a very inappropriate tone, and then he asked, when I told him what it was, he said 'Oh, I really like it because it smells like you just got out of the shower, and I would like to get some for my girlfriend. Where can I buy it?'"

Schweitzer said Robinson berated her for misstating the name of the hotel where witnesses would be staying. She believed the comment was gender-related because he was demeaning and spoke down to her. When asked how Robinson interacted with other females in the office, Schweitzer replied: "For the most part, he was -- I would say almost overly -- almost kind of protective and nice and sweet to them." When asked whether she had observed Robinson mistreating a woman, Schweitzer replied: "Other than his rubbing shoulders of Lori Lepore, which I believe was inappropriate, I did not see any other interactions that I felt were inappropriate . . . ."

Schweitzer admitted that other than McKendry's comments about being a "smart girl," "cutesy," and "a crazy woman with a gun," no one made remarks to her with gender-based content.

She stated that shortly after she began her job at the Bureau, Robinson said to her: "I hope you don't mind that I've made some corrections in editing [your reports]." When Schweitzer replied in the negative, Robinson said: "I'm glad to hear that because there was this female who worked here before who was offended every time I corrected her work and really made a big stink about it. So I'm really glad that you understand what we're doing here, that it's necessary. Everybody's work has to be edited before it's submitted."

In response to the question whether she believed she had performance weaknesses at the Bureau, Schweitzer responded, "absolutely, yes." She then described several areas where she believed her performance was deficient, blaming it on lack of experience in participating in criminal prosecutions and testifying in court, unfamiliarity with the county, unfamiliarity with protocol, unfamiliarity with the Bureau's report writing style, unfamiliarity with using a tape recorder, and unfamiliarity with the format of reports used by different departments and agencies.

She said she was not aware of any written communications from Bureau employees containing gender content. She stated she believed that gender bias was the only reason she was given negative performance evaluations. In response to the question whether she believed she was in any way physically mistreated, Schweitzer replied: "I wouldn't call it mistreatment. I think it was inappropriate when Jeff Robinson rubbed my shoulders on two occasions." She stated that being called a "smart girl" and "cutesy" was insulting, but acknowledged that no one at the Bureau had screamed or yelled at her or used profanities or obscenities when speaking to her.

Lyytikainen Declaration. Lisa Lyytikainen, senior deputy district attorney, presented a detailed description of Schweitzer's poor performance while they worked on the *People v. Howell* case. She stated that Schweitzer testified that a victim had been on time for a meeting a few days earlier when, in fact, the victim had been more than three hours late; she had falsely testified that she had not used leading questions while interviewing child witnesses resulting in impeachment by the defense; she made comments on sensitive issues during trial which could be overheard by the jury; she failed to help evaluate juror questionnaires; she disobeyed a direct order to not allow a victim and her mother to meet with the mother's boyfriend; she failed to ask necessary questions when interviewing a 13-year-old female victim; she demonstrated little or no understanding of the necessity of testifying accurately about the age of a victim;

she failed to show up for a meeting with a victim without giving prior notice; she failed to comply with a direct order to record interviews with witnesses, and when she did record the interviews, she frequently left the recorder on voice activation resulting in an accusation by the defense that the prosecution was altering interview tapes. Lyytikainen submitted trial transcripts demonstrating the confusion and embarrassment caused by Schweitzer's mistakes during trial.

Lyytikainen concluded that "I have never had a District Attorney investigator make the type of mistakes made by Ms. Schweitzer" and "I cannot recall ever having experienced this type of performance during trial by another District Attorney investigator." Lyytikainen also stated: "I saw no evidence of Investigator Schweitzer being treated any differently on account of her gender than any other investigator or employee. . . . Her work performance on a case in trial was less than I have experienced with other investigators, but that had nothing whatsoever to do with her gender. It seemed to me to have more to do with inexperience in the investigation and trial of child molestation and complicated criminal cases."

Norris Declaration. Arthur Norris, former deputy district attorney, stated: "While Ms. Schweitzer did a good job with respect to ensuring that the prosecution's witnesses were present and prepared, she displayed a disturbing lack of judgment with respect to a remark she made to me in open court [within the hearing of the defense attorney]. . . . Investigator Schweitzer made a reference about discussing the 'script' with my witnesses. . . . I was extremely concerned that the criminal defense attorney may have heard this comment and would have misconstrued what she said, taking her reference to a 'script' literally to mean that the prosecution had coached the witnesses or in some manner told them what answers to give. Nothing could be further from the truth. . . . Investigator Schweitzer's comment demonstrated a remarkable lack of judgment and common sense. . . . Investigator Schweitzer apologized and said she did not realize that this could have been a problem by creating a false issue for the defense."

Hamilton Declaration. Beth Hamilton, a former investigator, stated: "I never experienced any gender discrimination during my assignments with the Ventura County District Attorney's Office's Bureau of Investigation, nor did I witness any gender discrimination. . . . I can say with assurance that I never heard a word or a comment of women at the Bureau getting a raw deal or anything of that sort. If a woman applied at the Bureau and had 'the right stuff,' she would be hired and given every opportunity to succeed. . . . All of my performance evaluations were fair to me and not in any way gender influenced. . . . I worked closely with Mike McKendry and Jeff Robinson. I sat in the same office with them for five years. Both Jeff and Mike are exceptional people. . . . Jeff Robinson is a wonderful, warmhearted, and friendly person, absolutely very supportive of everyone in the law enforcement community, including women. Mike and Jeff were helpful to me, a female District Attorney investigator, and I always considered them friends."

Creede-Proett Declaration. Susan Creede-Proett stated: "I was always very happy with my evaluations. . . . I loved my job at the . . . Bureau . . . . I could not have enjoyed it so much and functioned so well if I had been mistreated or discriminated against. But my gender was never an issue. I was never denied any opportunity to pursue my goals or succeed because of being a woman. . . . Jeff Robinson, in fact, was highly complimentary of my abilities and reputation as an investigator. . . . Jeff never disparaged any individual based upon gender (or otherwise). . . . Mike McKendry was also complimentary of my work when he was a District Attorney investigator and I was with the Sheriff's Department . . . . On more than one occasion, Mike complimented my work as a detective."

LePore Declaration. Lorrinda LePore, an investigator with the Bureau from November 2002 to November 2006, stated: "During my employment with the . . . Bureau . . . I applied for a coveted position with a multi-agency . . . task force. . . . Soon after applying for that position, I learned that I was pregnant.

. . . Notwithstanding my pregnancy, the Bureau . . . chose me out of a group of people who applied for the position . . . . I did not, and do not, feel that there was any gender bias or gender discrimination toward me whatsoever by the Bureau . . . . In fact, I was hired by the [Bureau] at a time when there was a whole group of people attempting to get the same position, most of whom were men."

Miller Declaration. Mariaelena Miller began working at the Bureau in 1992 as a legal processing assistant. She was promoted to lead welfare fraud investigator after being sent to a year-long specialized training course in Huntington Beach. "I believe categorically that I have never been discriminated against by the . . . Bureau . . . . I have not been mistreated or treated differently because I am female or Hispanic. These have never been an issue whatsoever. . . . Far from being discriminated against because of being a woman, it has been my experience that the contrary is true: In the past, our office has tried to work with me. I am a divorced mother, so I am the only one who takes care of my son. The Bureau . . . has been extremely understanding of my need to be with my son at his athletic and medical appointments."

Alvarez Declaration. Christina Alvarez, an investigator since April 2006, stated that in June 2006, she received a promotion, and one year later, she received another promotion. She stated: "I have never felt that my ability to perform my job or to obtain promotions was impaired by being a woman. I have never felt that I have been treated any differently by my supervisors or the District Attorney's Office based upon my gender or otherwise. . . . The . . . Bureau . . . has a high degree of camaraderie in which we all work well together. . . . I did not know Tammy Schweitzer very well during the year she worked here; I spoke with her a few times during her employment . . . . Her concerns involved receiving adequate training and resolution to her questions. But Tammy never mentioned gender as a basis for her dissatisfaction with her employment here."

Briner Declaration. Robert Briner stated he became aware of performance problems with Schweitzer when Stone told him that Schweitzer was

"struggling with performance issues. These included grasping policies and procedures, report writing skills and being resistive to constructive criticism. . . . I fully supported the assignment of Acting Senior Investigator Jeff Robinson to work as Schweitzer's training officer and for him to continue with her performance improvement plan (PIP), which was already in place with Senior Investigator Mike McKendry. . . . Schweitzer said she would have no problem training with . . . Robinson. . . . She requested that matters of importance in the training program be fully explained to her, saying that this had not been done so far in her training process. . . . I spent several hours with Schweitzer explaining the tradition and operational philosophy of the Bureau . . . . I also explained to her in great detail about the various performance standards as listed in the office performance manual. I also explained every aspect of the PIP, including how it would be administered. . . . Schweitzer told me that she understood my explanation of the PIP process and that she understood what was expected of her by way of work performance. . . . I also conferred with Robinson on several occasions during Schweitzer's PIP process. I reviewed all of her weekly PIP reports, memoranda prepared by her (both first and final drafts), as well as case reports authored by her. . . . I also met with Schweitzer and Robinson together, when requested. In summary, I very carefully monitored her training process. . . . The District Attorney investigators are monitored closely by supervisory staff during their probationary period. . . . Based upon my review of Investigator Schweitzer's performance, I found that she lacked the use of good judgment. She also lacked sufficient writing skills necessary for the work . . . . Schweitzer lacked the emotional stability necessary for peace officers occupying the important and coveted position of District Attorney Investigator. . . . During my conversations with Schweitzer, she frequently complained that she was confused . . . the degree of confusion she frequently expressed was vastly disproportionate to what would be reasonable. . . . Schweitzer would frequently state that she was not given clear direction. . . . It . . . did not make sense to me that she said she was not given clear

job direction, because I personally spent hours upon hours explaining to her the aspects of her underperformance during the PIP. I personally explained to her, in detail, the importance of collaborating with other Bureau investigators and the need for her to be flexible in learning new ways to do investigative business. . . . She resigned from her position, making some statements to [Totten and Ellison] about her lack of training, with which I wholeheartedly disagree, and some statements about misconduct by Investigator Robinson. . . . After her resignation, the allegations against Investigator Robinson . . . were fully investigated by Deputy Chief Glen Kitzmann. Kitzmann conducted interviews and determined that the allegations against Robinson were unfounded."

Robinson Declaration. Jeff Robinson detailed his experiences with Schweitzer. He stated: "I have felt absolutely no gender bias toward anyone, including Tammy. I never said or did anything to her indicative of gender. In fact, I afforded Tammy more of my time, energy, effort, training, and materials than any other employee ever at the District Attorney's Office or, for that matter, in any law enforcement endeavor in which I have been involved. . . . Investigator Schweitzer's ability to recognize and develop leads was almost nonexistent. . . . In my performance evaluation of Investigator Schweitzer, I indicate that she had extremely poor writing skills. Her writing ability is beneath that even of a beginning patrol officer. . . . At our level of involvement in the criminal justice system, a high degree of writing proficiency is mandated. One recurring fault in Investigator Schweitzer's writing skill was her habitual inability to chronologically sequence events. . . . [Her reports] frequently read like a jumble of disconnected thoughts. . . . Some of Investigator Schweitzer's reports had missing relevant information, and occasionally contained inaccurate information. . . . Investigator Schweitzer failed to act on the potential location of a previously unknown molest victim. . . . I had often told Investigator Schweitzer that when she encountered a situation she did not understand she should feel free to contact me for guidance so that we could discuss it . . . . Investigator Schweitzer had been sent to an

investigation school by the office in the summer of 2006, but seemed to have profited negligibly from her attendance. . . . Investigator Schweitzer also failed to request and collect valuable evidenced mentioned by a witness on another occasion. . . . Investigator Schweitzer's inability to clarify directions and other facts in her reports illustrates the confusing and useless nature of her written product."

Robinson also noted that he had observed Schweitzer while she testified in the *Howell* trial and that she had performed poorly. He concluded: "Despite numerous meetings and discussions, Investigator Schweitzer never appeared to be attempting to assimilate into the office, and seemed to be merely trying to endure the Personal Improvement Plan during her probationary period. I never observed any true desire to achieve success during her training. She seemed disengaged in all my contacts with her."

Coronado Declaration**.** Judy Coronado said: "Tammy was . . . very problematic and difficult to deal with. I found that I had to coddle Tammy, in that she could not understand and comprehend basic office policies and procedures . . . [including] witness travel and lodging accommodations . . . access[ing] her voice mail system . . . deposit[ing] a check drawn payable to someone else into her own personal account . . . not working with [another employee] as I had instructed her to do. . . . In comparison with other District Attorney investigators, Tammy's ability to comprehend simple and routine procedures was dramatically substandard. . . . Tammy's demeanor was spacy. She was difficult to deal with. She had trouble understanding routine instructions about office procedure which no other investigator seemed to encounter. Tammy was defensive about her inability to understand routine office procedure, which made it very difficult to work with her. . . . In the several times I spoke with Tammy, she never mentioned gender. She never either formally or informally suggested to me, in my role as Human Resources Manager, that she had any concerns, complaints, or issues about gender discrimination or mistreatment. . . . In my capacity as Human Resources

Manager, I assisted Jeff Robinson as he addressed performance issues concerning Tammy Schweitzer. He never expressed any gender-related statements. His frustration was exclusively with her performance, never gender based."

McSilvers Declaration. Jessica McSilvers, administrative assistant, stated that Schweitzer was difficult to work with and violated office protocol when making travel arrangements for witnesses in the *Howell* case. She concluded: "Overall, I was left with a feeling that it is really scary that Tammy Schweitzer could carry a gun. . . . I had to repeat the simplest of tasks for Tammy over and over again which I believe that a peace officer should not be stumbling over and should not have to be babysat."

Trial Court Decision

After a lengthy hearing, the trial court granted summary judgment to the County on the grounds that Schweitzer failed to set forth any meaningful evidence giving rise to a triable issue of fact showing the existence of a hostile work environment or that defendant's true reason for its employment action was discriminatory or the product of retaliation. In contrast, the County presented a "cornucopia" of evidence that Schweitzer was not competently performing her job.

DISCUSSION

Standard of Review

"The grant and denial of summary judgment or summary adjudication motions are subject to de novo review." (*Nakamura v. Superior Court* (2000) 83 Cal.App.4th 825, 832.) "[I]n moving for summary judgment, a 'defendant [meets]' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant [meets] that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but,

instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) "We must presume the judgment is correct, and the appellant bears the burden of demonstrating error." (*Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376.)

FEHA Claims

Schweitzer's claims for gender discrimination, sexual harassment and wrongful termination arise under FEHA. (Gov. Code, § 12920 et seq.) FEHA is designed to further the public policy that "[e]mployment practices should treat all individuals equally, evaluating each on the basis of individual skills, knowledge and abilities and not on the basis of characteristics generally attributed to [protected groups]." (Cal. Code Regs., tit. 2, § 7286.3.) Specifically, FEHA prohibits "an employer, because of . . . mental disability, medical condition, . . . sex, [or] age . . . of any person, . . . to discharge the person from employment . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment . . . to harass [or] to fail to make reasonable accommodation for the known . . . mental disability of [the person]." (Gov. Code, § 12940, subds. (a), (j), (m).) The statute also prohibits an employer from terminating or otherwise discriminating against an employee because he or she has opposed any practices forbidden under the statute or has filed a complaint in any proceeding under it. (*Id.* at subd. (h).)

Gender Discrimination

An employee who claims discrimination must first make a prima facie case, consisting of evidence that she was within the class protected from discrimination and was performing her job competently, but was terminated--plus some other circumstance suggesting discriminatory motive. This showing raises a presumption of discrimination, shifting to the employer the burden of producing evidence to establish a genuine issue that the termination was made for a

legitimate, nondiscriminatory reason. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354-355 (*Guz*); *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098.) If the employer does so, the presumption disappears, but the employee, who retains the overall burden of persuasion, may then yet seek to show discriminatory motive by evidence that the employer's proffered reason was false and a pretext, and any other evidence of discriminatory motive. (*Guz*, at pp. 354-355.)

An employer's motion for summary judgment slightly modifies the order of these showings. If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. (See *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at pp. 850-851; cf. *Guz, supra*, 24 Cal.4th at p. 357.) To defeat the motion, the employee then must adduce or point to evidence raising a triable issue that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. (*Aguilar*, at pp. 850-851; *Guz*, at p. 357.) In determining whether these burdens were met, we must view the evidence in the light most favorable to the opposing party. (*Aguilar*, at p. 843.)

The basis for defendant's motion was that plaintiff was terminated for a legitimate, nondiscriminatory business reason, namely that she was incompetent and did not perform her job satisfactorily. To raise a triable issue of fact and avoid summary judgment based on the evidence presented by the County, Schweitzer was required to present "substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

"[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361, fn. omitted.)

Schweitzer has not met either her initial burden of proving a prima facie case of discrimination or that the County's stated reason for terminating her was pretextual because she has not provided evidence that she was qualified for the position or that she was performing competently in the position she held.

The purpose of probation is to provide management with a reasonable opportunity to observe and evaluate an employee's performance on the job before according her the status of permanent employee. (*Wiles v. State Personnel Bd.* (1942) 19 Cal.2d 344, 347; *Winter v. City of Los Angeles* (2002) 96 Cal.App.4th 1058, 1065.) The conduct that Schweitzer alleges was discriminatory indicates nothing more than that her supervisors were doing their job in evaluating a probationary employee. Schweitzer's assertions that her negative performance evaluations and denial of a merit pay increase show that she was treated differently than other employees are negated by the overwhelming evidence that she did not have the ability to perform the job, despite substantial efforts by her supervisors, administrative personnel, and the district attorney to train her.

Schweitzer has not demonstrated that she would not have been terminated but for her gender. (*Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426; *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1119-1120.) The trial court did not err in granting summary judgment on this cause of action.

Sexual Harassment-Hostile Work Environment

A hostile work environment sexual harassment claim requires an employee to show she was subjected to sexual advances, conduct, or comments that were (1) unwelcome, (2) because of sex, and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 278-279 (*Lyle)*; *Reno v. Baird* (1998) 18 Cal.4th 640, 646-647 (*Reno*).)

"[A] workplace may give rise to liability when it 'is permeated with "discriminatory [sex-based] intimidation, ridicule, and insult," [citation], that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]"'" (*Lyle, supra,* 38 Cal.4th at p. 279; see also *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043 [employee seeking to prove sexual harassment based on a few isolated incidents must show conduct was "'severe in the extreme'"].) However, "'Title VII [and the FEHA] does not prohibit all verbal or physical harassment . . . between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations.' [Citation.] Rather, "'[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" [Citation.] This means a plaintiff in a sexual harassment suit must show 'the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "*discrimina[tion] . . . .* "'" (*Lyle*, at pp. 279-280.) "Accordingly, it is the disparate treatment of an employee on the basis of sex--not the mere discussion of sex or use of vulgar language--that is the essence of a sexual harassment claim." (*Id.* at p. 280.)

The FEHA is not a civility code. (*Lyle, supra,* 38 Cal.4th at p. 295.) "[A] hostile work environment sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or

gender-related language toward a plaintiff or toward women in general." (*Id.* at p. 282.) "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive . . . .' . . . That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail . . . if a reasonable person . . . , considering all the circumstances, would not share the same perception." (*Id.* at p. 284.)

Whether the behavior complained of is sufficiently pervasive to create a hostile or offensive work environment is determined from the totality of the circumstances. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 142.) There is no recovery for harassment that is occasional, isolated, sporadic, or trivial. (*Lyle, supra*, 38 Cal.4th at p. 283.) Rather, plaintiff must show a concerted pattern of harassment which is repeated, routine, or generalized in nature. (*Mokler,* at p. 142.) The alleged incidents of sexual harassment cited by Schweitzer are not sufficiently severe or pervasive as a matter of law. The words "cutesy," "smart girl" and "crazy woman with a gun" are not the type of words that create a hostile work environment. (See *Lyle,* at p. 282 [supervisor's comment that employee was a "good girl" might be mean or unkind, but was not comparable to the type of demeaning slurs that give rise to actionable claims].) At most, they demonstrate attempts, perhaps ill-conceived attempts, at humor, on the part of Schweitzer's supervisors. The incidents involving shoulder rubbing on two occasions by Robinson and a compliment as to the perfume she was wearing by McKendry were isolated incidents, lasting a few seconds, and not the type of conduct that creates a hostile work environment. (See, e.g., *Mokler, supra,* at pp. 144-146 [three incidents involving sexual remarks and a brief sexual touching over a five-week period insufficiently pervasive as a matter of law].)**1**

1 We agree that Stone's e-mail to Robertson containing pictures of semi-nude women was distasteful and inappropriate. However, there is no evidence that Schweitzer received the e-mail or was even aware of it during her employment. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [if plaintiff

Contrary to Schweitzer's characterization of McKendry's and Robinson's treatment of her as harassment, the overwhelming evidence shows that they, and other Bureau employees, sought to give her the extra help she obviously needed to overcome her many performance problems. This scrutiny and attention is not harassment; instead, they were merely performing their jobs as supervisors to train and mentor a probationary employee. In *Reno*, *supra*, 18 Cal.4th at page 646, our Supreme Court explained: "'. . . [T]he Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. . . . Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. . . .'" (See also *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 64-65 [commonly necessary personnel management decisions such as hiring or firing, job assignments, performance evaluations, the provision of support and the like do not come within the meaning of harassment].)

The trial court correctly granted summary judgment on Schweitzer's hostile work environment claim.

Wrongful Termination

The absence of any triable issue of fact on the hostile environment claim is fatal to the constructive discharge claim. "Where a plaintiff fails to demonstrate the severe or pervasive harassment necessary to support a hostile work environment claim, it will be impossible for her to meet the higher standard of constructive discharge: conditions so intolerable that a reasonable person would leave the job." (*Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917,

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neither witnesses nor knows about harassment of others in the workplace, such evidence is irrelevant].)

930.) As discussed above, Schweitzer has failed to present sufficient evidence of a hostile work environment. Overwhelming evidence shows that, during her probationary period, Schweitzer failed to perform as required for the job. Thus, her wrongful termination claim under FEHA necessarily fails. (See, e.g., *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101, 115 [performance evaluation and criticism of work practices is a normal part of the employment relationship and does not transform a voluntary resignation into a constructive discharge as a matter of law].)[2]

Retaliation

A prima facie case of retaliation is proved where: (1) the plaintiff was engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

Schweitzer's contention that she was terminated in violation of public policy rests on Labor Code section 923, which declares a public policy of employer noninterference with union activities. She asserts that McKendry's statement that she should withdraw her response to the performance evaluation or their working relationship would be affected falls within the protection of this statute.

Schweitzer's assertion in this regard is devoid of merit. As a County employee, her right to submit a response to a performance evaluation is prescribed by the County's collective bargaining agreement with its employees and the Meyers-Milias-Brown Act (MMBA). (Gov. Code, § 3500 et seq., § 3501.) Government Code section 3510, subdivision (b) states: "The enactment of this

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[2] Schweitzer entitles two causes of action as "wrongful termination [violation of public policy]." However, the County has immunity from common law tort claims for wrongful termination. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899 [Gov. Code, § 815 bars *Tameny* actions against public entities]; *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 329 [same].)

chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." Moreover, there is no evidence whatsoever linking the submission of her response to her termination. The reason she was terminated, as stated by her supervisors and numerous other employees who worked with her, is because she was not competent to perform her job.[3]

Emotional Distress Claim

Because we conclude that none of the FEHA claims have merit, the intentional infliction of emotional distress claim also fails. (See *Jones v. Department of Corrections and Rehabilitation, supra*, 152 Cal.App.4th at p. 1382 [a "[f]urther, independent basis for disposing of these causes of action for emotional distress is that they are barred by the exclusivity rule of workers' compensation"].)

Conclusion

The County has presented strong, extensive, largely unrebutted evidence that it had a legitimate reason for terminating Schweitzer's employment. Schweitzer's evidence is insufficient as a matter of law to support a reasonable inference that the County acted with an illegal, discriminatory motive. The County properly utilized the summary judgment procedure to expedite litigation and eliminate a further waste of public funds which would have resulted in an utterly useless trial. "As other courts have aptly observed, '"[j]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one."'" (*Casenas v. Fujisawa USA, Inc., supra*, 58 Cal.App.4th at pp. 118-119.)

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[3] Schweitzer does not claim retaliatory discharge under FEHA, nor could she do so as she has not exhausted administrative remedies by including this claim in her FEHA complaint. (See, e.g., *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1612 [court had no jurisdiction to hear retaliation claim where FEHA complaint mentioned only racial and national origin discrimination].)

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Glen M. Reiser, Judge

Superior Court County of Ventura

Law Office of Maury Mills and Maury Mills for Appellant.

Law Offices of Alan E. Wisotsky, Alan E. Wisotsky and Jeffrey Held for Respondent.